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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 438

HARRIS-STANLEY COAL & LAND COMPANY, ET AL.,
Petitioners,

vs.

CHESAPEAKE AND OHIO RAILROAD COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Harris-Stanley Coal and Land Company, et al., respectfully represent that the Harris-Stanley Coal and Land Company owns a tract of coal land which it had leased to its co-appellant, Paintsville-Miller Creek Collieries Company, Inc., and Alexander Cameron years ago and they operated and delivered the coal from a tipple extending over the tracks of the railroad company until the said railroad company removed its tracks and refused

to take coal from the mining operations; that the railroad right-of-way at this point was 100 feet wide and the coal seam about 50 feet above the railroad tracks at that point; that at this point there was a precipitous cliff of rocks; that about 1943 the coal was mined out of the left hand entry and the appellants contemplated taking out the pillars which extended 1200 feet parallel with the railroad tracks and extended 50 feet back from the surface. The excavations were 50 to 100 feet back from the outcrop of the coal seams and consequently that far from the railway sidings on which the coal gons stood and were loaded and much farther from the main line of the railroad over which its passenger and freight trains passed.

The plaintiff, Chesapeake and Ohio Railroad Company filed suit in the United States District Court for the Eastern District of Kentucky, asking for an injunction to prevent the removal of these pillars. The District Court denied injunctive relief prayed for by the railroad company, holding among other things, "that the plaintiff here is asking the Court to exercise one of its most extraordinary equitable powers; that is, to enjoin a person from the free use of his property. While courts of equity have on occasion seen fit to go to this extreme such instances as revealed by the reported cases are rare. Where such powers have been exercised it is only after the Court has carefully considered the character and extent of the injury alleged, whether it is irremediable in its nature, whether an action at law would afford adequate remedy; whether the parties are able to respond for the damages resulting from the injuries and other considerations which ordinarily govern a Court of equity in the exercise of its preventive processes of injunction." Citing *Atchinson* v. *Peterson,* 20 Wall. 507.

The Court, however, held that "where plaintiff alleges a grievance affecting the value of his property he has a right

to apply for preventive relief." Citing *Arizona Copper Company* v. *Gallispis,* 230 U. S. 46. The District Court further pointed out that the rule of reason should be applied in such cases and such injunctions are denied where money damages will compensate the plaintiff (R. 50).

From this judgment of the District Court the railroad company appealed to the United States Circuit Court of Appeals of the sixth district at Cincinnati and that Court took jurisdiction, reviewed the opinion of the lower Court and reversed the judgment, holding in substance that plaintiff was entitled to a "permanent injunction restraining the pulling of the pillars or in raising the coal barriers in the left entry of the mine"; that no comparative injury would result to defendant if injunction were granted; that although no injuries have yet been shown, future injuries may be enjoined.

It is from this judgment of the United States Circuit Court of Appeals this Writ of Certiorari is prayed to this Court for the following reasons:

(1) The judgment of the United States District Court was not reviewable because it was the exercise of a sound discretion of the District Judge; that it was reasonable and that the exercise of that discretion was not abused.

(2) That the cases cited and relied on by the United States Circuit Court of Appeals are in conflict with opinions in other cases decided by the United States Circuit Court of Appeals, and of this Court as will be shown.

(3) Because of the importance of the questions to be considered in granting injunctive relief.

(4) That the Circuit Court of Appeals in this case decided questions of local law in conflict with applicable decisions of local Courts and decided questions in conflict with applicable decisions of this Court.

(5) That in granting injunction relief in this case, U. S. C. C. A. violated the 14th Amendment of the Federal Constitution and of Section 13 of the Bill of Rights of the Commonwealth of Kentucky and of Section 242 thereof.

Your petitioners believe that the aforesaid judgment of the Court of Appeals is erroneous and that this honorable Court should require the said case to be certified to it for review and determination in conformity with the law in such cases made and provided.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals of the sixth circuit, demanding the said Court to certify and send to this Court a full and complete transcript of the record and all proceedings in the case of Harris-Stanley Coal and Land Company, et al., vs. Chesapeake and Ohio Railroad Company, #9987, to the end that this case may be reviewed and determined by this Court and that the said judgment of the said Circuit Court of Appeals in said case and every part thereof may be reversed by this Honorable Court.

Respectfully submitted,

BAILEY P. WOOTTON,
NAPIER & NAPIER,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 438

HARRIS-STANLEY COAL AND LAND COMPANY, ET AL.,

Petitioners,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY

BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MAY IT PLEASE THE COURT:

This case is before this Court on Writ of Certiorari to the United States Circuit Court of Appeals in the 6th district, reviewing a judgment of the United States District Court for the Eastern District of Kentucky, Pikeville Division, dismissing a petition by the District Judge in which the Chesapeake and Ohio Railway Company sought an injunction compelling the respondent from removing pillars from a coal mine which they were operating along side the railroad company's tracks in Floyd County, Ken-

tucky. The opinion of the Circuit Court is in conflict with every other case we can find bearing on the subject of the use of discretion exercised by a trial Judge. The Circuit Judge, it is true, makes a lame excuse for disregarding the sound discretion of trial Judge. (R-297) and arrogates to himself the power to ignore that discretion exercised by him under authority of the Federal rule of procedure, 52(a); "Finding of facts shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of a trial Court to judge the credibility of the witness." The Circuit Court said: "The issue is whether in the light of all the circumstances there is threat of injury in the proposed operation of the coal company to the property of the railroad and to the lives of the passengers and crews upon its train" and then said: "That a reviewing Court is competent to draw the ultimate conclusion which evidentiary findings reasonably indued." Citing *Kuhn* v. *Princess Lyda of Thurn and Taxes,* 119 F. (2d) 704 (C. C. A. 3), and other cases noted hereinafter (R. 297).

Now, who is to draw the conclusions from the evidentiary findings? Not the reviewing Court certainly. The Circuit Judge said: "The evidence relied upon was opinion evidence as to the lik-lihood of future happenings" (R. 298). Then there were evidentiary findings and factual issues involved, and whose discretion was to be followed? The great weight of authorities lays down the inflexible rule that the trial Judge has that prerogative unless it is flagrantly abused, and there is no suggestion that such is the case here. In support of this we cite the *Kuhn* case cited by the Circuit Judge which says: "So long as a finding of fact is supported by evidence and it is not clearly erroneous it is to be accepted on appeal a verity." The reason of the rule rests in large part upon the fact that the trial Judge who hears the witnesses testify and observes their demeanor

upon the stand is better qualified to appraise the credibility of their testimony and to resolve the conflicts therein. So long, therefore, as a finding of fact is supported by evidence and it is not clearly erroneous it is to be accepted on appeal a verity. The above case does not relate to injunctive relief but to damages fixed by a Court and does not deal with facts relating to injunctive relief but to matters that relate to pay for services rendered. The Circuit Court based its opinion on an issue whether or not in the light of all the circumstances there is threat of injury in the proposed operation of the coal company to the property of the railroad and the lives of passengers and crews upon its trains. "The conclusion that there is or is not," said the Circuit Judge, "such danger and if there is whether it is imminent or remote is one that a reviewing Court is itself competent to draw." The case of *Globe Union, Inc.*, v. *Chicago Telephone Supply Company, et al.*, 103 F. (2d) 722; page 298 of the opinion of the Circuit Judge is relied on by the Circuit Court but that case announces the rule; "Findings of fact by a trial Court so far as there is any testimony consistent therewith must be treated as unassailable" (R. 297-298). That case is in conflict with the Circuit Judge's opinion and supports the rule in *Adamson* v. *Gilliland*, 242 U. S. 350; *U. S.* v. *Tyrahowski*, 50 F. (2d) 762; *Ott* v. *Long Beach Company*, 70 F. (2d) 1; *U. S.* v. *Beller*, 70 F. (2d) 463.

The *Letcher County, Kentucky case and others* v. *Defoe*, 151 F. (2d) 987, 6th Circuit, was cited by the Circuit Judge. Let us see what the facts were in that case. All the evidence in the *Letcher County* case consisted entirely of written instruments. Then there was no factual controversy (R. 298). Therefore, the District Court did not have before it witnesses testifying over a factual issue and so had no

way or discretion in observing the evidence as he would in the case of witnesses testifying before him as the trial Judge did in the present case. Then in such a state of case, as in the *Letcher County* case, the reviewing Court was competent to interpret the written instrument and to draw ultimate inferences and conclusions and was not bound to follow the decision of the lower Court for the reason that all the evidence in the *Letcher County* case consisted of written instruments but the rule is otherwise, as pointed out, if the lower Court had factual issues to judge from evidence of witnesses testifying before him. Therefore, the above case does not support the findings of the Circuit Court of Appeals and is in conflict with many decisions in this Court and local Courts on the question of injunctive relief. Among other things the Court in the *Letcher County* case said: "There was no factual controversy and no challenge to the evidentiary findings of the Court. The evidence consisted entirely of written instruments and other writings which a reviewing Court is competent to interpret and is not precluded from doing so by Rule 52 of the Federal Rules of Civil Procedure, 28 U. S. C. A. followed by Section 723c; "It is the duty of the reviewing Court to review the evidence in order to determine whether decisions below was or was not clearly erroneous and that duty becomes more imperative where the trial Court had no occasion to observe witnesses or to judge their credibility in arriving at a factual basis for decision" (R. 290). In this case the trial Judge did have an opportunity to observe the witnesses and judge their credibility in arriving at a factual basis for his opinion. It is the general rule in all the cases that where the District Court heard evidence of witnesses on a factual issue, as in the present case, his judgment becomes a verity and the parties are bound by it. To entitle the railway company to an injunction in this case,

as in all other such cases, it must allege and prove irreparable *injury* and the burden is on it to do so.

In the case of *L. & N. Railroad Company* v. *Smith* (a Kentucky case), 78 S. W. Ky. 160, at page 162, the Court stated that "It is neither alleged nor proved that appellees (seeking the injunction) have suffered irreparable injury by reason of the wrongs complained of. They stood by and saw their enormous outlay of money, time and labor on the part of the appellant in order to improve its tracks and facilitate the necessity of commerce and travel. They have an adequate remedy at law for whatever damages they may sustain by reason of the injury complained of and under the circumstances of this case, under the principles announced and the authorities *supra* we think they should be confined to compensation for the injury which may be presented at the return of the case."

That case fits the case at bar in more respects than the one presently under discussion. The C. & O. Railroad Company did not allege or prove in this case irreparable *injury*. They did allege irreparable "loss and damage" but that does not satisfy the requisite allegation necessary to support a petition for an injunction under any law we know anything about. Certainly not the law of Kentucky. In the case of *Ky. Electrical Development's Receiver* v. *Wells, Ky.*, 203, 1088 at page 1097, the Court said: "The rule is laid down in a large number of decisions that where the issuance of an injunction will cause great injury to defendant, and will confer no benefit or very little benefit in comparison upon complainant, it is proper to refuse the injunction, especially where the right is doubtful, or where money damages will compensate plaintiff or where the wrong may be otherwise redressed or where complainant can at comparatively slight cost protect himself." Citing *Herr* v. *Central Ky. Asylum*, 110 Ky. 281 and *DeVou* v. *Pence*, 32 Ky. L. Reports, 697, 106 S. W. 874.

The Kentucky Court of Appeals in citing *Hillman* v. *Hurley,* 82 Ky. 628, stated that that was a thorough and exhaustive review of the authorities on the question of injunction and it thus stated the law: "An injunction to restrain a trespass will not ordinarily be granted if the threatened trespass will destroy the very substance of the estate in the character in which it has been enjoyed or if so permanently and continuous that it can never be said to be complete so that the injury can be computed or if the injury cannot be estimated in money or if so vexatiously persistent in that a multiplicity of suits must result or if committed by one who is insolvent and against whom a verdict will be valueless." The Court then cites the case of *Barker* v. *Warmer,* 6 Ky. Reporter, 86, in which it was said: "It is true equity will sometimes enjoin a trespass but such is not the general rule * * * in order to authorize the Chancellor to interfere it must be accompanied by such peculiar circumstances as will make the injury irreparable at law."

The Court further stated that an irreparable injury is one in which the complainant cannot be equitably compensated in damages and noted that the case under consideration was one in trespass and that under the law is not such a one as would warrant the granting of an injunction. The case at bar is one to enjoin a trespass and would come under the rule laid down in the *Devoe* case and the other cases cited by the Court therein. *Richardson* v. *Penn Coal Company,* 203 Fed. 743-4 at 749 is to the same general effect.

"The question of whether there is an adequate remedy at law", said the Circuit Judge in this case, citing the case of *Society of Sisters of Holy Name, et al.,* v. *Pierce,* 296 Fed., 928, affirmed, 268, U. S. 510, page 298 of the opinion, continuing: "And what, in a given case is or not adequate legal remedy must be determined in the light of the cir-

cumstances in each particular case." Very true, and the trial Judge is the most competent to decide "in the light of circumstances" and to decide from the testimony of the expert witnesses testifying before him, whether in this particular case there was an adequate legal remedy. The *Holy Name* case said: "One of the elements which must be considered along with the rest for ascertaining and determining whether under the showing made complainant or either of them are meeting with irreparable and irremediable injuries which may not be as speedily and adequately met by such remedies as the law side of the Court may afford." Affirmed to 268 U. S. 510. The case of *Gormely* v. *Clark* cited by the Circuit Judge (R. 298), and reported in 134 U. S. 338 held that decisions of state Courts as a general rule will be followed as to construction of the laws of the state, unless in conflict with and impairing the efficacy of the provisions of the Federal Court or of the Federal Statutes * * * and it seems to us the Circuit Court in this case should follow the law as construed by the highest Courts of the state where the action originated. The Circuit Court stresses the point that there is a probability of a possible loss of lives threatened through the operation of the coal company to persons and crews on passing trains and also the disruption of train schedules, and the consequential inconvenience and loss to passengers and shippers using the passengers and he winds up by saying for this there is likewise no adequate remedy at law and cites the case of *Joy* v. *City of St. Louis,* 138 U. S. 1 and 46 and 49. In that case an injunction was sought to compel one railroad company to use the right of way of another and to use a single track through a public park instead of a number of tracks. That was to avoid desecrating a public park against the public interest. The railroad company was in the hands of the Court and the facts were undisputed. Opinion 299. The Court also cited

some other state cases from jurisdictions other than that of Kentucky (where the rights of the public were involved). Not parallel cases.

As to the case of *Harrisonville* v. *W. S. Dickey Mfg. Company,* 289 U. S. 334, page 300 of the Circuit Court opinion we think upholds our contention here although the Circuit Judge said not. The District Judge cited that case and quoted: (page 58 of R.), "Where substantial redress can be afforded by the payment of money and issuance of an injuction would subject the defendant to gross disproportionate hardship, equitable relief may be denied although the nuisance is undisputable. This is true even if the conflict is between interests which are primarily private." In connection with that, the Trial Judge stated that "Such a happening that is, that the mountain might fall at a time a train was passing would be a remote possibility." The property damage, if any, is not of such magnitude that it could not be speedily and adequately corrected (R. 57). And, said the trial Court: "There is nothing in the record to indicate that should such damage occur that it would be so great or excessive as to deny plaintiff full and adequate relief in an action for damages. It is true that the mountain might fall at the time the train is just at that particular point and injure or kill human beings but for that to happen would require a coincidence that would hardly be raised to the status of probability" (R. 57, 58). Only a vivid imagination can think otherwise.

In discussing this *Dickey* case and the findings of the trial Court the Circuit Judges cites a New York case to support his theory. As stated by the trial Court (R. 56, 57), the case at bar is based upon an anticipated damage or interference on which experts differ and that the right of injunctive relief is doubtful because of the lack of evidence of the nature required to sustain such relief. The plaintiff is not suffering at present by any wrong, incon-

venience, or damages by the defendant's mining operation" (R. 56). The Trial Court had knowledge of the witnesses who testified as to their standing in the community, as to their actions before him and was possessed of a knowledge of coal developments in the region where this suit originated. The Court stated that the witnesses offered by the plaintiff were accepted as men of ability and high character but their testimony is only an expression of opinion which must of necessity be accepted with some reservation; that the witnesses introduced by the defendant are of equal ability and integrity who stated as their opinion no damage would result to the railway (R. 57). Therefore, it is plain to see that there were factual issues in this case and these factual issues and the evidence is best judged by the trial Court and should not be dismissed merely by a statement of a Circuit Judge that the testimony on each side simply balanced and that there was no evidentiary facts, nor assume to judge of the credibility of witnesses. The Circuit Court said that "The issue is whether in the light of all the circumstances there is threat of injury in the proposed operation of the coal company to the property of the railroad and the lives of passengers." Opinion of the Circuit Court, page 297. But in the face of these evidentiary facts and all the circumstances surrounding them the Circuit Court reversed the fundamental law in such cases provided and the decisions of this Court and of the U. S. Circuit Courts. The Circuit Judge, page 300 of his opinion, cited the case of *Russell* v. *Farley*, 105 U. S. 433-438. On the point of comparative injury that might be sustained by the issue of an injunction or injury sustained by the plaintiff and the defendant resulting from issuing an injunction or not issuing it. What damage has the railroad ever sustained? None whatever. And there is no remote damage anticipated. There is no danger imminent but the defendant coal company certainly would sustain a very great and irreparable *injury*

and damage in the issuing of a permanent injunction against it. To say that a railroad line 130 miles long which is not a through line and only has a very few trains running over it per day would happen to pass this coal operation at the exact time that a slide would come off the mountain, and injure the train or disrupt its schedule or kill a passenger is too remote to justify the issuing of an injunction, we think, or a Court's consideration. This railroad has been in operation for over forty years as the records disclose and its right of way at this point is 100 feet wide (R. 244-5), and necessarily there are a number of side tracks and coal loading tracks between the main line and the foot of the cliff and if slides should come and the evidence does disclose that some 600 feet above the coal company's land (R. 95-101 and 245), a little slide came but it was not caused by this mining operation or any other but was caused by excavations of the railroad company (R. 245). It is not shown it caused any damage whatever and if it had the plaintiff had ample and adequate remedy at law because the defendants are not insolvent and no allegation of that kind was made in the complaint (R. 1-4). It was testified that a retaining wall would protect the railroad from any slides (R. 255).

The Circuit Judge refers to the case of *Herr* v. *Central Kentucky Asylum,* 110 Ky. 282, 289 (R. 300). A simple reference to that opinion is sufficient, we think, to convince a Court that no such injunction as the one in the case at bar should issue for in that case it is said, as cited by the trial Judge (R. 56), "An injunction ought not to be granted where the benefits secured by it to the party applying therefor is comparatively small while it will operate oppressively and to the great annoyance and injury of the other party and to the public unless the wrong complained of was so wanton and unprovoked as to properly deprive the wrong-

doer of all consideration for its injurious consequences." The Circuit Court in its opinion (R. 301) cites the case of *Swift and Company* v. *United States,* 276, 326. The Court in that case referring to argument of counsel among other things, said: "That an injunction may issue to prevent a future wrong although no right has been violated." That citation is mere dictum. The Circuit Judge also cited, however, the case of *Vicksburg Water Works Company* v. *Vicksburg,* 185 U. S. 65 (R. 301). In that case the sole question was "whether the bill as originally filed and as amended presented a Federal question." It, therefore, as in the *Swift* case, related to injunctive proceedings, vitally affecting the public. No such question as vital interest to the public is presented here. Citing also *Holy Name* case *supra.* In that case injunctive relief was asked for the Society of Sisters of the Holy Name to restrain the state from the exercise of an unconstitutional act of forcing all children to attend public schools only. Another case vitally affecting the public and the rights of the citizens • • • in no wise a parallel case to the one at bar. The case of *Adamson* v. *Gilliland,* 242 U. S. 350, reversed a decree of the Circuit Court of Appeals and affirmed the District Court and said: "That so far as the finding of the Master or Judge who saw the witness 'depends upon conflicting testimony or upon credibility of witnesses or, so far as there is any testimony consistent with the finding, it must be treated as unassailable.' " Citing *Davis* v. *Swartz,* 155 U. S. 531. In the case of *United States* v. *Tysakowski,* 50 F. (2d) 766, it is said: "Where a case is tried by the Court without a Jury its findings upon questions of facts are conclusive." Citing *Stanley* v. *Supervisors of Albany County,* 121 U. S. 535; *Duley* v. *Pease,* 180 U. S. 26 and *Ott* v. *Long Beach,* 70 F. (2d) before three Circuit Judges on appeal from the District Court, the Court saying: "The

issue of fact thus presented was a narrow one which the District Court met squarely and decided in favor of appellee." (Affirming judgment of the District Court.) "The weight of evidence could best be determined by the trier of fact who saw and heard the witnesses as they gave their oral testimony." Citing *Uihlien* v. *General Electric Company,* 47 F. (2d) 997. That case held that appellant Court must accept the finding of the trial Court based on conflicting evidence of witnesses testifying in open Court," and this well recognized rule, the Court added; "Has been applied in innumerable cases in this and other Courts and is well supported in reason. This rule necessitates acceptance of a finding by a trial Court based upon conflicting evidence coming from witnesses in open Court where credibility is largely determined by personal observance of the trial Judge." It is said that the witnesses in this case were honest and that the testimony upon each side was about equal, however, there was a conflict in their testimony—one set testifying that the removal of pillars would cause no damage and the other set testifying that it would cause damage.

Therefore, we submit that it was up to the trial Court to weigh the circumstances, the facts and use his discretion. The case of *United States* v. *Beller,* 70 Ky. 2d 463, was an appeal from the District Court and it was said in that case "As the Court said in *Hannigan* v. *United States,* 57 F. (2d) 860, it is too plain for discussion that if the record discloses substantial evidence to support the findings or judgment of the trial Court it cannot be disputed on appeal." Citing *U. S.* v. *Duncan,* 67 F. (2d) 660, and the *Tryrakawski* case, *supra.* In a line of decisions in the case of *Burford* v. *Sun Oil Company* and *Sun Oil Company* v. *Burford,* reported in 319 U. S. 315, 317 U. S. 87 and 130 F. (2d) 10, the Supreme Court reversed the Circuit Court of Appeals and

affirmed the District Court saying: "The matter of the issuance of extraordinary writ of injunction is and historically has always been one for the exercise of sound discretion." Citing *Douglass, et al.*, v. *Pan American Bus Lines*, 81 Fed. 222 (Circuit Court of Appeals opinion). *Dr. Wm. H. Hay Foundation* v. *Safety Harbor Sanitarium*, 145 F. (2d) 661 (C. C. A.), where it is said: "Whether one (injunction) should issue in a situation of this kind is always addressed to the equitable discretion of the Chancellor and it is only where it appears that discretion has been abused that an appellant court may reverse for its granting or refusal."

In *City of Ashland* v. *Beckham* (Judge Reese writing) 271 Ky. 96, Citing *Hamblin* v. *Durham*, 235 Ky. 842, the Court said: "An injunction will not be granted on the ground merely of anticipated damage or in apprehension of it but there must be at least a reasonable probability that the injury will be done if no injunction is granted." It was held in *Ky. Utilities* v. *Colonial Ice Company*, 279 Ky. 585, that: "The writ of injunction is recognized by all Courts as being one of extraordinary remedy. It cannot nor should it be employed except in cases of urgent necessity and the right to relief and the necessity must be clearly shown before relief under such a writ is granted." *Gregory* v. *Crane*, 291 Ky. 194, *Breathitt County* v. *Cockrell*, 250 Ky. 743, *Wallins Adm.* v. *Wages and Hours Division, U. S. Department of Labor*, 51 Fed. Sup. 1002 at 1004. "An injunction can only be granted where there is a threat of sufficient seriousness and imminent to justify coercive relief." Nor shall any man's property be taken or applied to public use * * * without full compensation." Constitution of Kentucky, Section 13, Bill of Rights, and Section 242 of the Constitution. The Court cited the case of *Ky. Building Corporation* v. *Commonwealth of Ky.*, 172

S. W. 2d, 661, and other cases to the effect that private property cannot be taken without just compensation.

There is attempted to be done in this case that which amounts absolutely to the taking of private property without just compensation being done. The coal company's property under a permanent injunction if granted in this case, can never be operated or used for any purpose. Section 5 of the United States Constitution provides that: "Nor shall private property be taken for public use without full compensation." Much less should a man's property be taken for *private* use. This injunction amounts to the taking of defendant's private property as it forever enjoins them from using it.

The complaint in this case alleges that unless this injunction is issued, "Great and irreparable loss and damage" will be sustained by plaintiff (R. 2, 3). The allegation must be "Great or irreparable *injury,*" section 272 of the Kentucky Civil Code, and the injury must be *irreparable* or any threatened damages *imminent* and the petition must so state, and that there is no adequate remedy at law, and no danger was imminent and these allegations are absolutely necessary before an injunction may be issued upon a complaint.

In Corpus Juris 2d, page 431, Section 19, this fundamental principle is laid down. "A permanent injunction should not be awarded except in severe cases and to prevent irreparable injury." Where complainant's rights is doubtful or his title is in dispute a perpetual injunction cannot be obtained until the doubt is removed by proper proceedings and the right made certain." Citing many U. S. Supreme Court decisions.

Again on page 435 Section 21, this principle is sustained by dozens of cases from all jurisdictions in the United States which are enumerated. "An injunction will be

granted if irreparable injury is threatened and impending to rights of complainant but injunction will not issue to allay the mere fears and apprehension of individuals," and "An injunction will not issue in the absence of an actual or presently threatened interference. It is not sufficient grounds for injunction that injurious acts may *possibly* be committed or that injury may possibly result from the acts sought to be prevented but there must be a reasonable probability that the injury will be done if no injunction is granted and not a mere fear or apprehension since injunction will not be granted merely to allay the fears and apprehension of individuals which may exist without substantial reasons and be absolutely groundless." Page 436-7. This fundamental principle is backed up by a citation of some two hundred cases from various Federal Courts and from Courts in practically every state in the Union and are in conflict with the opinion in this case. It is a principle too thoroughly established to question for one moment.

Writing upon discretion of Courts it is said in Corpus Juris 2d, page 420, Section 14: "That the power to grant or refuse an injunction rests in the sound discretion of the Court under the circumstances and facts of the particular case unless perhaps in cases where facts on which the injunction is asked present questions of law only." There are some two hundred and fifty or three hundred cases cited in support of this fundamental principle. It is stated in this same section, 14, page 425, among other things, that "The Court must be guided by conclusions based on the law and facts disclosed by the particular case." It further enunciated the principle that "The trial Court and not the appellant Court is the Court to exercise the discretion;" that the action of the Court may be reviewed on

appeal or error in case of a clear abuse of discretion but not otherwise. Citing many U. S. Supreme Court decisions.

In Section 1591 C. J. 2d, 485, it is said that: "Generally in the absence of manifest abuse is discretion an appellant Court will not review, modify or revise discretionary rulings as to the granting, dissolution, continuance or modification of an injunction or restraining order. Particularly is this true when the facts are in dispute."

It seems to us that this fits our case completely. No absence of discretion is hinted at in any of this record or in any of the decisions of the lower Court or the Court of Appeals. It is clearly a case of judicial discretion in granting the injunction by the lower Court and it was not abused in this case by the Judge, according to the record.

The judgment of the Circuit Court of Appeals is in conflict with all these cases cited by us and referred to herein and is in conflict with the opinions of *all* the Courts on the discretionary powers of Trial Courts in granting or refusing injunctions.

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals should be reversed and the judgment of the United States District Court be affirmed.

BAILEY P. WOOTTON,
NAPIER & NAPIER,
Attorneys for Appellants,
Hazard, Ky.

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No 438

Supreme Court of the United States

OCTOBER TERM, 1946

HARRIS-STANLEY COAL & LAND COMPANY, et al.,

PETITIONERS,

vs:

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LeWRIGHT BROWNING,
Attorney for Respondent.

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The opinion of the Circuit Court of Appeals, Sixth Circuit, is reported in *154 Fed. (2) 450*, and is reprinted at R. 294, et seq. The opinion of the District Court is reported in *56 F. Supp. 849*, and is reprinted at R. 50, et seq.

I.

No Grounds Exist Herein for the Granting of Certiorari.

(A) The question involved in this litigation is as to the right of the respondent railway company to injunctive relief against a threatened mine operation which

would create a situation dangerous to the operation of the railroad. There is no showing of any ground for certiorari under the provisions of

Rule 38, Rules of the Supreme Court.

(B) Granting of certiorari is not warranted merely to review the evidence or inferences drawn from it.

Gen. Talking Pictures Corp. v. Western El. Co., 304 U. S. 175.
Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508.
United States v. Johnston, 268, U. S. 220.

(C) Certiorari will not be granted "merely to give the defeated party in the circuit court of appeals another hearing."

Magnum Import Co. v. Coty, 262 U. S. 159.

II.

The Merits of the Case.

The issue directly presented is whether, in the light of all the circumstances, there is threat of injury in the proposed operations of the petitioner to the property of the railroad and to passengers and crews upon its trains or of disruption of train service and consequential inconvenience and loss to shippers and passengers. The finding of the Circuit Court of Appeals of the existence of such danger is amply supported by the evidence and the admitted physical facts, disclosed in the Court's opinion. Such conclusion also follows from the finding of the District Court (59, R.) that "there is possibility or even probability that the mountainside will slip or subside" as the result of the threatened mining operation. For this threatened danger there is no adequate relief at law, and injunctive relief is proper.

Joy v. City of St. Louis, 138 U. S. 1, 46.
Seaboard Airline R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.
Atchison, T., & S. F. Ry. Co. v. Spaulding, 69 Kan. 431, 77 Pac. 106.

The right of the respondent to injunctive relief against the threatened mining operation is based upon the reasoning in *Kansas City So. Ry. Co. v. Sandlin, 173 Mo. App. 384, 158 S. W. 857*, wherein, in the consideration of an almost identical situation, it was said:

> "* * * when it comes to a question of property rights only as against the safety and preservation of human life and limb, we think it is sufficient that the evidence reasonably shows the certainty that the *danger* exists rather than the certainty that a fatal disaster will occur. We think we should take cognizance that the law requires the *highest* degree of care on the part of carriers of passengers in maintaining a safe roadbed as well as in the actual operation of its trains. * * * It seems reasonable that, if the law requires this high degree of care on the part of railroads in maintaining a safe track and roadbed, the courts ought to see to it that they are not hampered in so doing."

The findings of the District Court, upon which the judgment of dismissal was based, were not binding upon the appellate court. The essential facts, for the most part physical, are not in dispute, and the conclusion as to whether or not the operation of the railroad is endangered by the threatened mining operation, is one which the reviewing court is competent to draw from the admitted or established facts. The judgment of the District Court was primarily based upon the conclusion that the respondent railway company had an adequate remedy at law, which was a conclusion of law and not binding upon the appellate court.

Stubbs v. Fulton Nat. Bank, (C. C. A. 5), 146 Fed. (2) 558, cer. den., *325 U. S. 864.*
Murray v. Noblesville Milling Co., (C. C. A. 7) 131 Fed. (2) 470, cer. den., *318 U. S. 775.*
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Kuhn v. Princess Lida of Thurn & Taxis, (C. C. A. 3), 119 Fed. (2) 704.
In Re Chicago & N. W. R. Co., (C. C. A. 7), 110 Fed. (2) 425.

The fact that the respondent railway company possesses the power of eminent domain and may condemn land necessary for the protection of its right of way, is not a limitation upon its right to injunctive relief against threatened trespasses resulting from a wrongful or unreasonable use of adjacent property. As pointed out by the appellate court, such argument defeats itself because if the threat of injury is too remote to sustain injunctive relief, it is likewise too remote to establish necessity for condemnation. Moreover, the rule that equity will not interfere by injunction, if damages will provide adequate compensation for the threatened injury, contemplates recovery *from* the wrongdoer, not *by* him.

It is respectfully submitted that the petition for certiorari should be denied.

LeWRIGHT BROWNING,
Counsel for Respondent.